

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE DREDGE CORPORATION,

Appellant,

vs.

J. RUSSELL PENNY, STATE
SUPERVISOR, Bureau of Land
Management, et al. ,

Appellees.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

GEORGE W. NILSSON
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PETITION FOR REHEARING

Appellant presents this, its petition for rehearing of the above entitled cause, by the Court sitting en banc, and in support thereof respectfully shows the following, which appellant believes are substantial errors of this Court, as shown from its opinion dated May 23, 1966:

I

The principles contended for by the appellant herein are important because:

(a) These principles are important to mining generally as well as to the appellant directly;

(b) The Department of Interior should be compelled to obey the Constitution, leaving legislation to the Congress, (See Pages 6 and 9 of our closing brief) and to administer all laws as written

and intended.

(c) Laws affecting mining should be liberally construed as directed by decisions of the Supreme Court of the United States and other courts.

II

(a) The court erred in deciding that the Secretary of the Interior in issuing his so-called Regulations in the summer of 1938 was merely acting within his discretion. See page 3 of opinion which reads in part:

" . . . In our judgment the Regulation was a proper exercise of administrative discretion under the Act. . . "

The Regulation above referred to, first issued in 1938, (see 43 C. R. F. '1954rd' 257. 15 (a)) reads in part as follows:

" . . . Any minerals subject to the leasing laws in the lands patented or leased under the terms of the act may be disposed of to any qualified person under applicable laws and regulations in force at the time of such disposal. No provision is made at this time to prospect for, mine, or remove the other kinds of minerals that may be found in such lands; and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting or disposition. "

(b) Nothing in the Small Tracts Act gave the Secretary of the Interior the power or the discretion to differentiate between issuing oil and gas leases covering small tracts and refusing to permit the location of mining claims thereon.

(c) The so-called Regulation, which shuts off the mining of "other kinds of minerals", is not a Regulation, but an attempt to amend the law, because the Secretary did not agree with the provisions of the law passed by the Act of Congress.

"To regulate means to adjust by rule or method or established mode; to direct by rule or restriction; to subject to governing principles of law, but the term does not include the power to prohibit. "

The above definition of "Regulate" and "Regulation" has been decided by many courts. Under the limitations of the rules of this court such quotations cannot be given, but we are prepared to furnish them.

III

It is clear that the intention of the Department of the Interior was to prevent the location of mining claims contrary to the provisions of the Small Tracts Act instead of Regulating such mining operations.

This is proved by the address of Hon. H. R. Hochmuth before the Rocky Mountain Mineral Law Institute on July 17, 1964 quoted on page 9 of our closing brief and the statements contained in the brief of the United States in the District Court on behalf of the defendant herein, quoted on page 6 of our closing brief.

Such position taken by the Department of the Interior is therefore, unconstitutional, illegal, contrary to the Small Tracts Act and shows that the Secretary's action in issuing the "Regulation" here under review was arbitrary, capricious and an abuse of any

discretion which the Secretary might have had.

Such attempt to shut off mining of "other kinds of minerals" was an unconstitutional attempt by the Secretary to repeal a portion of the Small Tracts Act.

IV

The Small Tracts Act gave to the Secretary the power to issue regulations. He issued regulations for oil leases to be issued over small tracts, but refused to issue any regulations concerning location of mining claims.

The law was passed in June, 1938. "Regulations" were shortly thereafter issued. Our mining claims were located in 1952; 14 years later.

If the regulations issued in 1938, refusing to issue a regulation concerning location of "other kinds of minerals", was actually the use of discretion, such discretion did not last 14 years. The only discretion the Secretary had was to prevent the location of mining claims until he could apply to the Congress for an amendment of the Small Tracts Act to prevent the location of mining claims.

V

(a) The principles contended for by the appellant herein is important to the Mining Industry of the State of Nevada because mining is by statute designated to be important to the State and a public use. 516.010 et seq., Nevada Revised Statute.

(b) The result of this case is also important to the City of Las Vegas, Clark County, Nevada, because the sand and gravel on these claims are located close to this city and therefore important

to it. (See Record.)

VI

In our opinion the decision in the case of Superior Sand and Gravel Mining Company v. Territory of Alaska, cited on page 3 of this Court's decision, is not applicable here because the lands in Alaska were school lands. Naturally, mining would be incompatible with the use of lands for schools.

In our case the Small Tracts are private, there is no more damage to the land by mining "other kinds of minerals" than there is for drilling for oil. Therefore, the Secretary, in allowing oil and gas leases, but prohibiting location of mining claims, was doing something which the statute does not authorize him to do.

In addition, as pointed out above, if the law was injurious to the Small Tracts owner, the amendment to the law had to be passed by the Congress and not by the Secretary of the Interior.

WHEREFORE, the appellant respectfully requests that this Court grant its petition for rehearing.

Dated July 15, 1966.

Respectfully submitted,

GEORGE W. NILSSON

DEANER, BUTLER & ADAMSON

By: GEORGE W. NILSSON

Attorneys for Appellant

CERTIFICATE

I have been practicing law for more than fifty years, during all of which time I have handled mining law. I have been admitted to this court since on or about October 17, 1923.

I certify that in my judgment the foregoing Petition For Rehearing is well founded and that it is not interposed for delay, but to secure justice for the mining claimant and proper administration of laws affecting mining.

/s/ George W. Nilsson
GEORGE W. NILSSON

